SETIABUDI DEVELOPMENT SDN. BHD.

v.

WONG KING FUN & 3 ORS. (PRACTISING AS M/S. WONG-CHOOI & MOHD NOR)

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO. D5-22-665-93]
16 FEBRUARY 1994

PRACTICE & PROCEDURE: Order 18 r. 19(1) Rules of the High Court 1980 - Application to strike out writ - Whether claim sustainable - Whether claim bound to fail - Whether claim amounted to an abuse of the process of Court.

The defendants in this case were advocates and solicitors with the first defendant also acting as director of a company known as Wong Lim Development Sdn Bhd (WLD), a housing developer, as well as executive director of Pertama Malaysia Finance Bhd (PMF).

In 1982 the plaintiff entered into a joint venture agreement with WLD to develop five pieces of land into a housing estate. By this agreement WLD was given full authority to source out for financial facility and an irrevocable power of attorney was executed by the plaintiff to this effect. Consequently a bridging loan of RM 1.5 million was secured by WLD from PMF. On 26 May 1986, at a meeting at the plaintiff's solicitor's office, the plaintiff and WLD decided to restructure their loan facility in order to finance the second phase of the housing estate. They later on applied for a fresh loan of RM 750,000 from PMF. This second loan was applied for and obtained in the name of the plaintiff, but as the whole of the said loan was meant for the use of WLD in developing the second phase, a letter of indemnity indemnifying the plaintiff against possible losses was issued by WLD to the plaintiff.

On 27 October 1986 PMF made the first release of RM 200,000 of the said second loan to the defendants and the sum was eventually disbursed off by the defendants according to the instructions of PMF. The plaintiff objected to the disbursements and commenced action against the defendants claiming the RM 200,000 on the grounds, inter alia, that the defendants had accepted the said money only as trustee and stakeholder of the plaintiff and that there was no proper instruction for disbursement given by the plaintiff to the defendants in respect of the said money. The defendants applied under O. 18 r. 19 of the Rules of the High Court 1980 for the striking out of the claim on the grounds that it was frivolous, vexatious and an abuse of the process.

The main issue was whether the defendants were acting as the plaintiff's solicitors in the documentation for the second loan and if so, whether they were accepting or holding the first release of RM200,000 as trustees for the plaintiff.

Held:

[1] The defendants were not acting for the plaintiff in the documentation for the second loan and nor were they holding the first release of RM 200,000 as trustees for the plaintiff. The plaintiff cannot be heard to say that its solicitors were the defendants as the facts clearly showed that it was Messrs. Sidek Zubir Sulaiman Nadzir & Partners that acted as its solicitors. It is also evident in this case that the defendants were only acting as solicitors for WLD.

[2] No affidavit had been filed by the plaintiff to rebut the affidavit allegations of the defendants that WLD had the absolute authority to disburse the second loan by virtue of the power given it under the joint venture agreement. The law is clear that material allegations on affidavits which are not contradicted are deemed to be admitted.

[3] A plaintiff is entitled to pursue a claim in the Court however implausable or improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial.

[4] In this case there is no basis at all upon which it can be said that the plaintiff can ever succeed at trial. The plaintiff clearly had no interest whatsoever in the said second loan or any part thereof as the facts showed that it had already received the full proceeds of its entitlement in the sale of the houses under the joint venture agreement. In the light of the strong and unchallenged affidavit evidence of the defendants the action is just unsustainable.

[5] The plaintiff's claim is also defeated by limitation as although the release of money was

on 29 October 1986, the first demand made by the plaintiff was on 15 April 1993 and the action was filed only on 24 June 1993. Since this does not involve any trust property s. 22 of the Limitation Act 1953 does not apply and the plaintiff was therefore bound by the six-year limitation period.

[Plaintiff's claim struck out].

Cases referred to:

Overseas Investment Pte. Ltd. v. Anthony William O'Brien & Anor. [1988] 3 MLJ 332 ***(foll)***

Sarjit Singh Khaira v. Government of the State of Sarawak & Anor. [1990] 2 MLJ 251 ***(cit)***

Lonrho plc v. Fayed & Ors. (No. 2) [1991] 4 All ER 961 ***(cit)***

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director General of Trade Unions & Ors. [1990] 3 MLJ 231 ***(cit)***

Goh Koon Suan v. Heng Gek Kiau & Ors. [1991] 2 MLJ 307 ***(cit)***

Tan Eng Khiam v. Ultra Realty Pte. Ltd. [1991] 2 MLJ 234 ***(cit)***

Resources Mining Pte. Ltd. v. Puteh bte Abdullah & Ors. [1989] 3 MLJ 393 ***(cit)***

Legislation referred to:

Limitation Act 1953, ss. 6, 22

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c) and (d)

For the plaintiff - H.C. Wong; M/s. Onn & Partners

For the defendants - Mohd. Nor Mohamed (Ooi Soo Jit with him); M/s. Wong-Chooi & Mohd Nor

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

According to the statement of claim, the defendants had acted as solicitors for the plaintiff in their transaction relating to the borrowing of RM750,000 from Pertama Malaysia Finance Bhd. (hereinafter "PMF"). At the defendants' request dated 21 October 1986, PMF had on 27 October 1986 deposited RM200,000 into the defendants' client's account. The plaintiff was subsequently aware of this when PMF demanded this amount from the plaintiff as the defendants had never informed them of the matter. Consequently, the plaintiff's solicitors had sent a letter of demand to the defendants dated 15 April 1993.

In response to that letter, the defendants had told the plaintiff's solicitors that the defendants had already returned RM150,000 to PMF, RM42,923 to Wong Lim Development Sdn. Bhd. (hereinafter "WLD") and the defendants as progress payments and solicitors' fees respectively and the balance of RM7,077 to WLD. The plaintiff, however, had never instructed the defendants to pay RM150,000 to PMF and had never received any invoices from WLD or the defendants to necessitate the said payments. In the event, the plaintiff had claimed from the defendants the RM200,000, damages to be assessed and costs.

By summons in chambers filed on 26 August 1993, the defendants had applied to strike out the writ of summons and statement of claim under O. 18, r. 19(1)(b), (c) and (d) of the Rules of the High Court 1980, or alternatively under the Court's inherent jurisdiction, with costs. The two supporting affidavits had been affirmed by the first defendant, who is also a director of WLD, and the executive director of PMF.

The first defendant had averred that the defendants were acting as solicitors for WLD which on 1 August 1982 had entered into a joint venture agreement with the plaintiff to develop five pieces of land namely SPK No. 3378, 3379, 3359, 3360 and 3361, Lot Nos. 1152, 1153, 1133, 1134 and 1135 Mukim Pekula, Daerah Kuala Muda, Kedah (hereinafter "the said lands") into a housing estate. Under the joint venture agreement, WLD was authorised to apply for bridging finance from any bank, finance company or other financial institution to finance the development of the said lands which they did when the said lands were accordingly charged to PMF for RM 1,500,000. An irrevocable power of attorney was executed by the plaintiff.

The said lands were subsequently divided into separate lots including seventeen shop lots. At a meeting held on 26 May 1986 at the plaintiff's solicitors' office, the solicitors being Messrs. Sidek, Zubir, Sulaiman, Nadzir and Partners, it was agreed between the plaintiff and WLD that the parties do apply and obtain a fresh loan facility from PMF to finance the development of the shop lots and in the process to obtain a discharge of all other completed lots under development as the first phase of constructing and developing all the residential houses had been completed. It was also agreed that in the event the fresh loan for some reason had to be obtained in the plaintiff's name, the first defendant and the other director of WLD namely Lim Chor Seng were to give a letter of indemnity to the plaintiff to indemnify them against all loss,

damage, suit, claim and action which may be suffered by or taken against the plaintiff.

A fresh facility of RM750,000 was subsequently applied for and obtained from PMF but due to the fact that the first loan was not then fully settled, it was desirous that the fresh facility be granted as part of a restructuring scheme of the previous first loan as a consequence whereof the letter of indemnity was duly given to the plaintiff by the directors of WLD. Under the restructuring scheme, the outstanding balance owing to PMF under the first loan had to be settled in order to obtain a discharge of the charge over the said lands and the shop lots, and the shop lots were to be recharged back to PMF as security for the second loan and in order to facilitate the same, PMF would release part of the second loan amounting to RM200,000 upon completion of all security documentation pertaining to the second loan.

The plaintiff was at all material times fully aware of the restructuring scheme and had in fact signed PMF's letter of offer dated 3 August 1986, signifying their acceptance of the terms and conditions therein, executed the charge dated 16 October 1986, and passed the respective resolutions pertaining to the second loan. All directors of the plaintiff and WLD had given a personal guarantee to PMF for the purpose of the second loan. As part and parcel of the restructuring scheme, RM200,000 out of the RM750,000 was to be released upon completion of all legal documentation mainly for the purpose of enabling the plaintiff to settle all the outstanding balance due under the first loan which stood at RM299,295.01 as at 30 September 1986. On 14 October 1986, PMF had executed the discharge of the charge on the said lands and had on 27 October 1986 forwarded to the defendants the RM200,000 on the defendants' undertaking to settle the entire outstanding debt under the first loan as stated in their letter dated 21 October 1986.

The RM200,000 was paid into the defendants' client's account on 29 October 1986 and although the plaintiff had been informed of the fact of the remittance by a letter to them on 27 October 1986 from PMF, which was the same day the money was sent to the defendants, they had made no objection to the release until the present suit. In compliance with the undertaking imposed on them, the defendants had paid out, from the said release, a sum of RM150,000 to PMF towards the outstanding amount under the first loan and the balance thereof were also paid off by WLD from its own financial resources without any contribution from the plaintiff. The following is a summary of the payments made in compliance with the undertaking -

Amount outstanding			RM299,295.01
less			
payment made by the defendants	RM150,000.00		
payment made by WLD	RM 10,356.92		
fresh loan obtained by WLD secured by other Properties	RM138,938.09	RM299,295.01	
			000,000.00

In his affidavit, the Executive Director of PMF had categorically stated that if not for the undertaking by the defendants, PMF would not have released the RM200,000 which was the prerequisite provided in the letter of offer dated 3 August 1986 and that if PMF had not been paid the balance of the first loan, the second loan would certainly have been revoked. A sum of RM7,014 from the remainder of the said release was utilised towards payment of the disbursements incurred in preparing and perfecting the legal documentation of the second loan and RM42,923 had been forwarded to WLD for payment towards the amount due to the contractor engaged in the joint venture project namely M/s. Chuan Hoe Huat Construction Sdn. Bhd. WLD had in fact paid the contractor by three payments of RM15,000, RM25,000 and RM5,000 on 5 November 1986, 27 January 1987 and 28 January 1987 respectively. At all material times during the restructuring process, the plaintiff was represented by their solicitors in the security documentation pertaining to the second loan of RM750,000 and the loan was disbursed to the defendants by agreement between the parties as the whole of the said loan was meant to be for the use of WLD in the development of the shop lots. It is on that basis that the letter of indemnity was given by WLD to the plaintiff.

It is the defendants' contention that WLD had the absolute power and authority to disburse the second loan in its absolute discretion by

virtue of the power and authority given under the joint venture agreement and the plaintiff had no interest whatsoever in the said second loan nor any part thereof. Having regard to the facts stated, it is thus clear that the defendants were neither acting for the plaintiff in the documentation for the second loan nor holding the first release of RM200,000 as trustees for the plaintiff as alleged in the statement of claim. It is further noted that the plaintiff has received to date a total of RM1,143,015 as the full proceeds of its entitlement in the sale of the residential houses under the joint venture agreement.

Up to the date of the hearing, not a single affidavit had been filed by the plaintiff to rebut the allegations of the defendants and the celebrated decision in *Overseas Investment Pte. Ltd. v. Anthony William O'Brien & Anor.* [1988] 3 MLJ 332 has made it quite clear that material allegations on affidavit which are not contradicted are deemed to be admitted.

From the facts stated, it is also quite evident that the plaintiff has no beneficial interest in the matter and that the defendants were not acting as solicitors for them but for WLD. The fact that this action had been instituted some seven years after the event strongly indicates bad faith on the part of the plaintiff. I am fully aware of the approach to be taken by the Courts in applications like this as has been correctly enunciated in *Lonrho plc v. Fayed & Ors.* (No. 2) [1991] 4 All ER 961 namely "Where, however, the application is made under O. 18, r. 19(1)(b) or (c) or the inherent jurisdiction of the Court on the ground that the claim is "vexatious" or an abuse of the process of the Court, evidence is admissible to show that this is the case. But the test is a high one. A plaintiff is entitled to pursue a claim in these Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial."

In the instant case, I fail to see how the plaintiff can ever succeed at trial. Apart from the absence of affidavits on behalf of the plaintiff, this Court was not inclined to agree with the submissions of learned Counsel for the plaintiff, in view of the wealth of affidavit evidence from the defendants, that this was a matter strictly between the plaintiff and the defendants and had nothing to do with WLD, that the loan taken by the plaintiff was given by PMF to the defendants as stakeholder, that it was held by the defendants on trust as solicitors for the plaintiff, that the first defendant was acting in a conflict of interest position, and that there was no instructions or power given to WLD to obtain the bridging finance on both occasions.

The plaintiff cannot also be heard to say that their solicitors were the defendants as the relevant meeting on 26 May 1986 for the restructuring of the loan between them and WLD was in fact held at the office of Messrs. Sidek, Zubir, Sulaiman, Nadzir & Partners, who were their solicitors, and the defendants as solicitors for WLD were also present. This meeting had resulted in the plaintiff's solicitors writing to the defendants on 29 May 1986 as to the agreement reached three days earlier. There cannot therefore be any doubt as to the proposals accepted at the meeting. Earlier, on 1 August 1982, the plaintiff had entered into a joint venture agreement with WLD and they simply cannot claim ignorance as to how the two loans for the project were obtained from PMF. In fact, they had given an irrevocable power of attorney to WLD for this purpose. In particular, as agreed for the second loan, the two directors of WLD had even given a letter of indemnity as required to the plaintiff as the financing had to be taken in the name of the plaintiff and not WLD as this loan was part of the restructuring scheme in relation to the earlier loan. To top it all, the plaintiff had even accepted the terms stated in PMF's letter of offer dated 3 August 1986 by signing thereon and they had also been simultaneously informed of the RM200,000 release to the defendants as agreed under the restructuring scheme. Clearly, the plaintiff had all along been aware of the release and had no beneficial interest in the money, and the defendants had never held it on trust for them.

A proceeding is said to be vexatious when the party bringing it is not acting *bona fide*, as evidenced from the delay in filing the suit, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result. And it is certainly an abuse of the process of the Court where the proceeding is wanting in *bona fides* and is frivolous, vexatious or oppressive. Accordingly, it was my finding that the plaintiff's action was unsustainable in the circumstances in the light of the strong and unchallenged affidavit evidence of the defendants.

Quite apart from that, I had also held that the plaintiff's claim is defeated by the six-year limitation provision in s. 6 of the Limitation Act 1953 as although the release of the money was on 27 October 1986, the first demand made by the plaintiff was only on 15 April 1993 and the action was filed only on 24 June 1993. Since it is my opinion that this did not involve trust property, the contention of the plaintiff that s. 22 of that same Act applies, namely that no period of limitation is prescribed for trust property, cannot hold water.

In these circumstances, I had granted the order in terms of the defendants' application to strike out the plaintiff's claim with costs.

SUPPULETCHIMI A/P KARPAYA

v.

PALMCO BINA SDN. BHD.

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CIVIL SUIT NO. 22-384-93]
2 MARCH 1994

PRACTICE & PROCEDURE: Application to strike out writ - Order 18 r. 19(1) Rules of the High Court 1980 - Reasonable ground for proceeding with action - Determination - Whether subject to optimum evaluation approach.

PRACTICE & PROCEDURE: Application to strike out writ - Order 18 r. 19(1) - Inadmissibility of affidavit evidence - Rule 19(2) - Whether application thereof absolute.

PRACTICE & PROCEDURE: Inherent powers of Court to make order - Order 92 r. 4 - Whether overriding in effect.

This was an application by the defendant under O. 18 r. 19(1) Rules of the High Court 1980 to strike out the statement of claim of the plaintiff on the grounds, *inter alia*, that the claim disclosed no reasonable cause of action.

The defendant were building contractors who undertook to develop a piece of land in Sungai Ara, Penang, into a housing estate. At the material time the said land was partly occupied by licensed occupiers and arrangement was thus made between the defendant and the said occupiers whereby the defendant would compensate the said occupiers by providing them a new house free of charge on the latter demolishing their houses and vacating the said land. In consequence thereof, one Muniandy, as licensed occupier of house no.107 thereon, was made entitled to a free double storey detached house on his undertaking to demolish house No. 107 together with "all buildings and structures appurtenant or appertaining to the said house". An agreement to this effect was executed on 9 July 1993 between the defendant and a representative of Muniandy.

Standing next and juxtaposed to house No. 107 was a living structure known as no. TI 866. The plaintiff, who was the wife of Muniandy, claimed to be the equitable occupier of this structure and contended that since it was a house by itself seperate and disjunct from house No. 107, it was not therefore subject to demolition under the